Supreme Court, U.S.
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80-1270

No. .....

In the Supreme Court of the United States

October Term, 1980

MICHAEL H. MITCHELL,
Petitioner

vs.

AMALGAMATED COUNCIL OF GREYHOUND DIVISIONS: AMALGAMATED TRANSIT WORKERS: GREYHOUND LINES, INC. and FRANK SWIPES,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

Both the Trial Court and the Court of Appeals stated that a union member cannot prevail in a "duty of fair representation" case unless it is shown that the union acted arbitrarily, capriciously, or in bad faith. However, neither Court addresses the standards to determine and define the terms "arbitrarily", "capriciously" and "bad faith" as applied in this case. Indeed, no cases from any federal courts have been found defining these terms.

The general question presented by this petition then is how is the above noted standard originally set forth in *Vaca v. Sipes,* 386 U.S. 171 (1967) to be specifically applied. More specifically, the question is whether under the undisputed facts of this particular case the union could properly plead and prove that it fairly represented petitioner.

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LOWER COURT OPINIONS

Opinions in this case were delivered by Honorable William K. Thomas of the United States District Court for the Northern District of Ohio and by the United States Court of Appeals for the Sixth Circuit. Judge Thomas' opinions are appended hereio as Exhibits A and B and the Circuit Court's opinion is attached as Exhibit C. No opinion was reported.

BASIS FOR JURISDICTION

Review is requested of the judgment of Sixth Circuit Court of Appeals. This judgment was entered on August 13, 1980. Jurisdiction of this Court to review this decision is conferred pursuant to 28 U.S.C. §1254(1).

FEDERAL STATUTE INVOLVED

This petition involves interpretation of Section 301 of the National Labor Relations Act, as amended (29 U.S.C. §185) which provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

At all times material to this case Petitioner, Michael Mitchell ("Mitchell") was employed as a bus operator by Respondent, Greyhound Lines, Inc. ("Greyhound"). At the beginning of 1973 Mitchell was based in Cleveland, Ohio, and was a member of Division 1043 of Respondent, Amalgamated Council of Greyhound Divisions ("Council"). The Council has, at all times material to this case, been the exclusive bargaining agent for Mitchell and all other Greyhound operators. At all times material to this action, Greyhound and the Council were parties to a collective bargaining agreement.

The contract between Greyhound and the Council established a procedure whereby each operator employed in the northeastern section of the Greyhound system could annually transfer to a different terminal within that territory. This procedure was known as the annual run bid. Once such a transfer took place the operator could

exercise his Greyhound seniority to secure a specific run operating out of the new terminal. The greater the transferred operator's company seniority, the greater his ability to secure a run of his or her choice.

In late 1972—early 1973, Mitchell was working the extra board in Cleveland, Ohio. The extra board was a group of drivers employed by Greyhound at its various terminals to work on a "stand by" basis. These extra operators filled in when regular operators were off or unable to work and manned buses run by Greyhound as supplements to its basic schedule or for charters. Because of the nature of their status, extra operators had no set work schedule and were essentially "on call" at all times. The inability of a dispatcher to reach an extra man would cause that operator to fall to the bottom of extra board, causing a loss of income.

Regular runs, the alternative to the extra board, were meted out in accordance with the operator's company seniority date. Carrying a seniority date of 5/17/61, Mitchell, in 1972-1973, did not have sufficient seniority to hold a regular run in Cleveland. Desiring to escape the extra board, Mitchell decided to exercise his annual run bid rights and transfer to Buffalo, New York. Several years earlier, Mitchell had worked out of Buffalo as a member of Council Division 1203. At that time, despite his relatively low seniority, Mitchell had held a regular run operation out of a satellite terminal in Elmira, New York.

Despite its status as a regular run, this Elmira based job was not attractive to the drivers based at the Buffalo terminal. Generally, the least senior man in Division 1203 was assigned to Elmira. Mitchell, however, preferred the regular Elmira run to his extra board duties in Cleveland. It was Mitchell's intention to transfer to Division

1203 through the annual run bid and, once in Buffalo, exercise his seniority to "bump" the operator of the Elmira run. In early 1973, just prior to the submission of annual run bid requests, Mitchell was in Buffalo and inquired about the Elmira run. He was surprised to discover that Respondent Frank Swipes ("Swipes"), with a seniority date of June 14, 1956, was working the Elmira run. Faced with this inability to secure the Elmira job, Mitchell submitted no annual run bid request. Had he done so, he would have been forced to relocate in Buffalo and work the extra board in Buffalo.

Swipes had been hired by Greyhound as an operator effective June 14, 1956. However, on June 1, 1958, he ceased being a driver and was made a dispatcher trainee. Subsequently he became a dispatcher and did not again become a driver until August, 1972. Shortly after becoming aware that Swipes was again a driver, Mitchell filed a grievance. Mitchell contended that the placement of Swipes ahead of him in seniority violated the collective bargaining agreement. Specifically, Mitchell contended that Swipes should not, under the contract, have been permitted to accumulate seniority during the period from June 1, 1958 to August, 1972. The contract allowed accumulation of supervisor seniority only if the person involved had been in the bargaining unit for two full years before becoming a supervisor.

Greyhound rejected Mitchell's grievance without addressing its merits. In its response, Greyhound asserted that any such protest was untimely. This position was based on a provision of the agreement requiring seniority protests to be filed within thirty (30) days of the posting of the annual seniority roster. The 1972 roster had been posted on July 1, 1972. Greyhound's position was asserted notwithstanding the fact that Swipes did not become an

operator until after the passage of thirty (30) days from the date on which the 1972 roster was posted. Upon receipt of Greyhound's answer, Owen Jones, then president of Mitchell's Cleveland local, now national president, advised Mitchell to withdraw his grievance and refile within thirty (30) days of the posting of the 1973 roster which occurred in October. Mitchell filed a second grievance on the same issue.

Once again, Greyhound deemed Mitchell's grievance to be untimely. This time Greyhound contended that Swipes' name had appeared on the operators' seniority roster for several years without challenge. Mitchell's second grievance was pursued and reached the Contract Interpretation Committee ("C.I.C."). On June 6, 1975, the Council withdrew Mitchell's grievance. Through the medium of the C.I.C., the Council adopted Greyhound's position as to timeliness and asserted "Trainee period not part of supervisory status."

Mitchell appealed this decision to Respondent, Amalgamated Transit Union ("International"), but was told by it that the C.I.C. decision was final. On October 27, 1976, Mitchell filed his action in the District Court under Section 301 of the National Labor Relations Act, as amended (29 U.S.C. §185). The case was tried without a jury and the District Judge issued his oral ruling immediately after the close of the trial. The Judge rejected the timeliness argument advanced by Greyhound and the Council. However, the Judge found that the Council and International had fairly represented Mitchell and granted judgment for all defendants. Mitchell's Motion for Reconsideration was overruled on May 1, 1978, and this timely appeal was filed on May 17, 1978. The decisions of the Trial Court were affirmed.

REASONS FOR ALLOWANCE OF WRIT

The evidence presented by Mitchell at trial was generally uncontroverted and displayed many instances where the Council deviated from the contract in finding against him on his grievance. Based on the definitions of "arbitrariness" and "bad faith" used in other areas of law this evidence showed that the Council and International had failed to represent Mitchell fairly. Neither the Trial Court nor the Court of Appeals gave any insight into the parameters of the governing terms set forth in the *Vaca v. Sipes* standard. Indeed, no definitions of the terms used in *Vaca v. Sipes* have been found in other decisions under Section 301, National Labor Relations Act, as amended. The factual setting of this case provides a unique opportunity to amplify *Vaca v. Sipes* and clarify the fair representation obligation of a union to its members.

The Council's decision to withdraw Mitchell's grievance had two separate bases. One of these, timeliness, was deemed improper by the District Judge. Had the Council rejected the grievance solely on the basis of its purported lack of timeliness, its duty to fairly represent Mitchell would have been violated. The only remaining possible basis for the Council's position is its characterization of Swipes' training period as non-supervisory. Mitchell submits that the evidence relating to the adoption of this second basis reveals the arbitrary bad faith efforts of the Council.

The June 6, 1975 decision itself identifies no basis for the Council's conclusion regarding the training period. Inquiry by Mitchell produced a letter from the National President, Edward A. Ploski ("Ploski") proclaiming that the exclusion of a training period from supervisory status was historically based. Like the C.I.C. decision, Ploski's

letter provided no insight into the specifics of the "historical" foundation for the Council's decision. Ploski's own testimony described but one specific instance of consideration of the supervisory status of a dispatcher trainee. Interestingly enough, the individual involved there was Swipes.

Ploski testified Swipes approached him some time in 1969 and inquired about his possible seniority status should he (Swipes) wish to return to driving. When this inquiry was made Ploski was President of Division 1203, the Buffalo local of the Council and Swipes was superintendent of drivers in Buffalo. Swipes conceded that at the time he posed this question, he had no intention of returning to the drivers' ranks. Shortly after receiving Swipes' inquiry, Ploski advised Swipes that the training period was not part of his supervisory status. Ploski's position was reasserted in an exchange of letters between himself and Fred Dunikowski, a Greyhound official. Neither Ploski's letter to Dunikowski in 1969 nor his deposition testimony revealed the basis for his conclusion.

This 1969 interpretation, the only "historical precedent" identified, did not arise from a contested proceeding where parties interested in the issue could present their facts and arguments. This "decision" was nothing more than an advisory opinion stated by an individual having no authority beyond the Buffalo, New York local.

The extent of Ploski's authority in 1969 is also important in analyzing the impact of this so called precedent. Ploski admitted that the characterization of Swipes for seniority purposes would affect members of local divisions other than Ploski's Division 1203. Because this issue reached beyond Division 1203, Ploski lacked the authority to give Swipes any form of binding response. Article A2(w), of the collective bargaining agreement provides:

> "When any issue shall arise under the provisions of this agreement that affects the interests of employees of more than one of the Divisions of the Union, such issue shall be arbitrated only by action and authority of the Council."

The efficacy of Ploski's 1969 determination as a basis for future decisions on the subject is further eroded by the portion of Article A-23 which reads:

> "The settlement of a grievance on any level below the C.I.C. does not establish a contract interpretation or precedent."

Clearly, Mitchell was entitled to an honest consideration by the Council of the merits of his contention that Swipes became a supervisor on June 1, 1958. Reliance by the Council on nothing more than Ploski's 1969 decision deprived Mitchell as grievant of a variety of his contractual rights. The 1969 advice served as a virtual "litmus paper" test compelling denial of Mitchell's grievance. Either in the context of this specific grievance, or at some earlier date, a consideration of the training period question by the Council itself was essential. It is clear that the Council sought to sidestep the difficult question Mitchell raised and to summarily and perfunctorily dispose of it by relying on Ploski's previous, and purely local opinion on the issue.

Other evidence supports the foregoing assertion. In an early stage of the processing of Mitchell's grievance the Council requested that Greyhound supply seniority data pertaining to Swipes. In response to this request Greyhound employee K. M. Powell issued a letter dated July 16, 1974 which concluded by stating that Swipes "accepted a supervisory position on June 1, 1958." As noted before, June 1, 1958 was the date on which Swipes became a dispatcher trainee. Also, June 1, 1958 was less

than two (2) years subsequent to Swipes' commencement of work with Greyhound. In finding against Mitchell, the Council simply chose to ignore the very seniority information it had solicited.

Courts dealing with other areas of the law have, however, stated definitions of both "arbitrary" and "bad faith" which are usable in the context of this and other cases arising under Section 301, National Labor Relations Act. In a case dealing with review of an administrative decision the Court of Appeals for the Eighth Circuit defined arbitrariness as follows:

> "To have administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was 'willful and unreasoning action, *without consideration and in disregard of the facts or circumstances of the case.*'" (emphasis added) *First National Bank v. Smith*, 508 F.2d 1371, 1376 (8th Cir. 1974).

Examples of the Council's lack of reasoning and failure to deal with the important issues specifically raised by Mitchell's grievance are legion.

Although not in a fair representation case the concept of good faith has been defined in cases arising under the National Labor Relations Act. These cases involve bargaining obligations under Section 8(a)(5) of the Act but the generality of their holdings facilitates their application to matters such as this one.

> "Good faith means sincerity, candor and willingness to negotiate toward the possibility of effecting compromises." *NLRB v. Generac Corp.*, 354 F.2d 625, 628 (7th Cir. 1965).

> "The parties are required to deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or differences existing between them.

. . . ." *NLRB v. Wonder State Manufacturing*, 344 F.2d 210, 215 (8th Cir. 1965).

NLRB v. Columbia Tribune Publishing Co., 495 F.2d 1384, 1391 (8th Cir. 1974). The record here strongly indicates that the Council in passing upon Mitchell's grievance had no intention of reconsidering Ploski's advice to Swipes in 1969. Neither the candor, sincerity or openmindedness in representing Mitchell inherent in the definition of good faith was exhibited by the Council. Choosing to credit the informal resolution of the problem by Ploski in 1969 over Greyhound's position asserted through Parnell in the course of these very grievance proceedings exhibits the Council's lack of good faith as defined above. Another strong indication of the Council's lack of a sincere desire to reach a just and proper resolution is its assertion of the same timeliness position advanced by Greyhound and discredited by the lower Court. This shows the Council's desire to avoid the substance of Mitchell's Complaint thereby insulating Swipes from a true decision.

Not only for Mitchell here but for other union members who might be unfairly represented, the failure, particularly that of the Court of Appeals, to define with more precision the burden of proof, should be rectified. This case presents an opportunity for this Court to continue the development of federal labor law.

Respectfully submitted,

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APPENDIX A

Decision of the United States District Court

(Oral Ruling March 1, 1978)

Civil Action No. C 76-1143

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL H. MITCHELL,
Plaintiff,

vs.

THE AMALGAMATED COUNCIL OF GREYHOUND DIVISION, *et al.*,
Defendants.

ORAL RULING OF THE HONORABLE WILLIAM K. THOMAS, JUDGE OF SAID COURT, ON WEDNESDAY, MARCH 1, 1978

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[2] THE COURT: The arguments having been concluded, the evidence having been submitted, I come now to consider both Mr. Mitchell's claim on the merits as well as the defendant's motion which would suggest that, granting everything he says is true, he doesn't have a lawsuit.

First of all, I overrule the motions of the company and the union on the proposition that, indeed, I do think there is a ground here for considering the matters on

the merits, and I go directly then to evaluate the claim of Mr. Mitchell.

Mr. Mitchell in his amended complaint, Paragraph 12, in part, contends that in handling Plaintiff's grievance regarding F. Swipes, the union failed to fairly represent plaintiff's interest. At the end of that first section of Paragraph 12, he continues:

"The union's breach of its duty to fairly represent plaintiff included but was not limited to the following."

And then he proceeds to list four different subparagraphs, although for present purposes I [3] think we can take Paragraph (b) as the heart of the case.

"Accepting that within the contract interpretation committee and adopting as a basis for decision the totally untenable argument that the trainee period served by F. Swipes should not be part of his supervisory status."

All counsel agree, and I certainly concur, that I must first decide the standard that a Court must adopt in adjudicating this dispute between Mr. Mitchell, his union and his employer.

Putting it in simplest terms, this is not a lawsuit where this Court has to decide or a jury sitting in that jury box has to determine whether the light was red or green and whether the defendant was negligent or whether the defendant was guilty of contributory negligence. In that instance, in that situation the Court is the first trier of the fact, he is the adjudicator of the fact, or the jury is the trier of the facts and the adjudicator of the facts, and the standard then becomes one of where lies the truth, where are the greater probabilities in terms of weighing the evidence.

I don't approach this case in that fashion. [4] I don't, in effect, try this case de novo.

I have examined all of the authorities that have been cited here on both sides. I think the Sixth Circuit's decision in Dill does still indicate the standard that I must apply, and Judge Weick in this decision, Dill v. Greyhound Corporation, 435 F. 2d 231 (1970), put it in these words at page 237:

"The only question remaining is, therefore, whether in the settlement of the Douthitt-Nipp grievances without invoking arbitration, the bargaining representative was guilty of unfair representation of its employees."

Here, the plaintiff, Mr. Mitchell, bases his claim, as I have just read Paragraph 12, on a claim of unfair representation on the part of the union and then he claims, in tandem that the company violated the collective bargaining agreement.

So I have to primarily decide the question of whether or not the Amalgamated Council and the International Union are guilty of unfair representation of Mr. Mitchell in the handling of this important seniority issue involving Mr. Mitchell and involving Mr. Swipes, both of [5] whom are members of the union.

Dill v. Greyhound Corporation cites Humphrey v. Moore as one of the authorities in the issue of unfair representation. It also cites Vaca v. Sipes. And a reading of Humphrey v. Moore would not suggest that it sets up any different standard of review than Vaca v. Sipes. On the contrary, it repeatedly speaks of the duty of fair representation as the very premise upon which it was deciding the case. And, too, in this case, reported, incidentally, at 375 U.S. 335, you had an issue of merging employees from two companies and determining the im-

portant issue of seniority. The Court laid down principles which were then the principles applied in Vaca v. Sipes and, thus, at 386 U.S. 171 at 177 the Court starts off by saying:

"It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the union had a statutory duty fairly to represent all of those employees both in its collective bargaining with Swift"—and then it cites Ford Motor Company v. Huffman—"and in its enforcement of the resulting collective bargaining **[6]** agreement. See Humphrey v. Moore, 375 U.S. 335."

The two cases that counsel for the plaintiff suggested as having some application I don't really believe alter the situation. One is Bieski v. Eastern Automobile Forwarding Company and the other one, Price, clearly does not. Price is the lower court case.

Even if Bieski, which appears at 396 F. 2d 32, were regarded as in any way establishing a rule of reasonableness as contrasted with the more heavy burden of proving either discriminatory conduct on the part of the union or bad faith or arbitrariness or capriciousness in their conduct, I would have to part company with the majority. I think Chief Judge Seitz, in his dissent, is much more to the point and much more in line with the cases I have previously mentioned—Humphrey v. Moore and Vaca v. Sipes—than the majority in the opinion written by Judge Van Dusen.

This Court a couple of years ago had to determine a seniority issue regarding the Penn Central employees and New York Central employees, when they merged those two corporations, with reference to work at the Cleveland Union Terminal, and for the purpose of the record the **[7]** case is Williams v. UTU, C74-890, a case in the local court,

and at that time I concluded—and I have not changed my judgment since then, after going back through these cases —that the duty of their representation is, indeed, the test, and at that time I cited Vaca, I cited Dill, I cited Louis v. Magna, as establishing a standard for determining the conduct of the union.

I adhere to that ruling and I follow the standard which has been laid down in Humphrey v. Moore and Vaca v. Sipes and, indeed, certainly in Hines v. Anchor Motor Freight as the test I must apply here.

So we proceed, once having decided the standard that is applicable.

I come then to the first question, which indeed is a procedural question: Did Mr. Mitchell, as a grievant, have standing to grieve the matter of the presence of Mr. Swipes on the master seniority roster?

His grievance, which I think is indeed a repetition of an earlier grievance, in effect, says this, and this is the one that was filed on October 19, 1973:

"It has been brought to my attention that [8] there is some doubt that former supervisor F. Swipes had the required number of years as a driver to maintain his rightful position on the seniority roster."

I just state, parenthetically, that the way that grievance is phrased indicates that, indeed, this is an open question. It is not, even in Mr. Mitchell's mind, one-sided. He very candidly says there is some doubt. So, obviously, somebody in the union has to resolve this doubt.

I think that, though it is true as a general principle that seniority rosters, once established, ought not to be disturbed, I think actually we are facing here an exception to that principle as we deal with this question of whether

Mr. Mitchell has standing to pursue this matter on the merits.

It seems to me as long as Mr. Swipes was in a supervisory position, he did not constitute a threat to any hourly rated employee's job if he might want to bid a job either on the Elmira run or Buffalo-Cleveland run, or any other run, and it seems to me that, in a sense, using lawyer language, there was no justiciable issue, [9] there was really no adversary situation here that presented itself and, in effect, it almost became a hypothetical situation until August 1, 1972, or within a couple weeks of that.

Mr. Swipes, apparently brought on by the Wilkes-Barre flood, high waters, determined he wanted to go back on the line and go back as a driver and be able to have some time off from time to time. So then it was that he gave up his supervisory job and bumped the driver who was operating the Elmira-Buffalo run and took the job.

It seems to me there that the question of Mr. Mitchell's standing should be faced in terms of August 1 or August 12, 1972, and thereafter, rather than before.

Looking at it that way, and bearing in mind that during that 30-day period after July 1 when, apparently, that roster came out, or thereabouts, Mr. Swipes was still a supervisory employee, I would think then that the issue was not a closed issue and that once he indeed bumped the man and became a driver again, it would be, then, the succeeding master roster that is at issue and, as I understand it, that [10] master roster did not actually come out until some time in September of 1973.

So the grievance which Mr. Mitchell filed on October 19, 1973, I determine to be a timely grievance.

We return then to the merits of this controversy and whether, on the evidence, Mr. Mitchell has shown that the

Amalgamated Council or the International Union has failed in its duty of fair representation in connection with the conduct which follows the filing of this grievance but which really exemplified and must focus in on the action of the contract interpretation committee in its decision which was rendered on, I believe, June 4th or June 5th of 1975. And since I have laid aside the standing question, I take up only the last sentence of Item 15 in which there is a specific finding, "Trainee." They had—I guess it looks like the word plus—no, I'm not sure whether it's plus or thus. The following words read, "Training period in the part of supervisory status." So I gather when they say, "Same answer as 14 above," they mean the union is withdrawing the grievance and they are making a [11] finding that Mr. Swipes' trainee period as a dispatcher-trainee was not part of supervisory status and, therefore, under Article 56, he is entitled to accumulate his seniority. During the period from January 1, 1959, until 1972 he was in differing supervisory positions.

That rather cryptic decision of the C.I.C. was amplified by Mr. Ploski, apparently in response to Mr. Mitchell's letter dated July 15, 1975, regarding the decision of the joint C.I.C. on Mr. Mitchell's grievance which protested the seniority of Mr. Swipes on the master seniority roster.

Mr. Ploski goes on to say that:

"The committee did render its decision based on information such as personnel records, etc., in determining their position. Also connected with the decision was the question of training period prior to accepting the position of supervisor as was this case. Historically, and as ruled in this case, the training period is not considered a part of the supervisory status, in accordance with the contract, namely, Article 56. Supervisory seniority, page 21 and 22 of the contract."

[12] At this point I digress to what I think has to be the criteria that I must apply here, and I accept the only definition that appears—I certainly haven't read this whole document to be present in the contract in defining just what a supervisory position is. This appears in Article I, "Recognition," and it says:

"The company recognizes the union as the duly-designated sole and exclusive collective bargaining unit for all employees as set forth in the wage provisions hereof or any substantially similar occupations as the same are created in the groups and departments hereinafter referred to, except for supervisory employees with the power to hire or fire or with the right effectively to recommend hiring or firing."

Then bearing in mind what Mr. Ploski has just indicated that was considered by the C.I.C., and bearing in mind certain additional facts in this record which attempt to flush out and add to the record contained in the documents already referred to, namely, the joint C.I.C. minutes and the Ploski letter of July 17, 1975, I turn to what else we have in this record.

[13] Plaintiff understandably argues with considerable force, and has reiterated it in final argument, that I should let the whole case turn on the letter of K. M. Parnell, Area General Manager, written on July 16, 1974, relating to the Mitchell grievance. The last paragraph reads as follows:

"Driver Swipes was originally employed on July 1, 1952, and resigned in 1955. He was rehired with the seniority date of June 14, 1956. He accepted a supervisory position on June 1, 1958, and returned to his present driving position effective August 1, 1972."

However, there is also in the record another statement by the company, and that's the statement of Mr. F. Dunikoski, Regional Manager of Eastern Greyhound Lines, written earlier on July 21, 1969, in which he concurred with the letter of Mr. Ploski dated July 12, 1969, in which Mr. Ploski had stated as follows:

"As per Mr. Swipes' record, his seniority date is 6-14-56. On 1-15-59 he was promoted to the position of dispatcher, replacing Robert Cumming, who will return to the driving ranks."

And he refers to the article that was [14] apparently then in force, which is now Article 56, and he concludes by stating:

"Therefore, the contract speaks for itself and Mr. Swipes retains and accumulates seniority rights and benefits while in such position."

He asked for confirmation and Mr. Dunikoski responds by stating:

"Please be advised the company concurs in your position and a copy of this correspondence will be permanently placed in his"—that's Swipes—"personnel file as a matter of record."

So that what we have, I think, looked at most favorably from the plaintiff's standpoint in terms of this record, is a contradictory expression of opinion by management as to the correct seniority date of Mr. Swipes.

In that kind of a state of conflict, I think it is appropriate for me to look at the entire record. And what do we find? We find that the only other evidence—and, really, getting right down to basic evidence, the only persons who have testified here about the question of what kind of things Mr. Swipes was doing, so that we

can then test it by the language and by the definition of supervisory [15] position, are indeed Mr. Ploski's deposition and Mr. Swipes' deposition.

Ploski says that he was in the union during the period he was a trainee. It's not very specific language, not nailed down too much, but it's all we've got in this record insofar as whether or not, indeed, he was in the union during that period.

We certainly also have some confirmation of that by the position that that very union took, according to Mr. Ploski's letter of 1969 when the union agreed that his seniority, Swipes' seniority, did not begin until he actually became a dispatcher.

Swipes himself, even though he was subjected to very vigorous cross-examination, certainly does not bear out any possible claim that he had any supervisory duties. It may be he was following the dispatcher around and he was learning the business, but the final line was that he didn't make any decisions. So he neither made a hiring or firing decision nor did he make a recommendation for hiring or firing.

On that kind of record, considering all the evidence here, even if I were sitting in [16] trial de novo, I would have to say the plaintiff had not proved that claim by evidence that preponderates or by the greater weight of the evidence.

But that, as I said earlier, is not the test. The test is whether or not this union, through the C.I.C. has acted so as to unfairly fulfill its duty of representation to Mr. Mitchell, which is the basis of the lawsuit here.

My conclusion is, after examining this whole record and applying the law that I think is pertinent, that, indeed,

there is no showing of dishonesty on the part of the union, there is no showing of deceit of any kind on this record, there is no showing of overt discrimination.

Sure, there is a suggestion, and I can understand there is some plausibility to the fact that, while Ploski was the union's top dog, he was also working under Mr. Swipes, and yet that, in and of itself, is not, certainly, enough to show bad faith nor to show discrimination nor to show any arbitrary or capricious conduct on the part of the union. But, more importantly, I think we have to look at the action [17] of the C.I.C. which is the very body which by this union agreement is the one charged with interpreting, and they say that the trainee position was not supervisory.

So we finally, then, come down really to what Humphrey v. Moore was talking about where a union is riding, necessarily, on the backs of several horses, and, obviously, sometimes they go off in different directions, and the question is have they treated one horse more unfairly than another.

Well, this is what Humphrey v. Moore says on page 350:

"As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination. After Dealers absorbed the Louisville business of E&L, there were fewer jobs at the Dealers than there were Dealers and E&L drivers. One group or the other was going to suffer. If any E&L drivers were to be hired at Dealers, either they or the Dealers' drivers would not have the seniority which they had previously enjoyed. Inevitably, the absorption would hurt someone. But choosing to integrate seniority lists based [18] upon length of service at either company, the union acted upon

wholly relevant consideration, not upon capricious or arbitrary factors. The evidence shows no breach by the union of its duties of fair representation."

It is my finding in this case that the evidence shows no breach by the Amalgamated Council nor by the International Union of its duty of fair representation to Mr. Mitchell. Likewise, then, I also find there was no breach of the contract by the company; and, accordingly, I find against the claim of Mr. Mitchell and in favor of the defendant unions and the defendant Greyhound.

At this time if you want to make exceptions in the record or if there is anything else to put on the record, please do it before we close court.

MR. FLUDINE: By virtue of the amended complaint, there is also the defendant Swipes.

THE COURT: I also find judgment in favor of defendant Swipes who was necessarily part of this case because the case couldn't be decided without his presence and I ordered him [19] made a party to this case.

At this time please close court.

APPENDIX B

Memorandum and Order of the United States District Court

(Filed May 1, 1978)

C76-1143

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL H. MITCHELL,
Plaintiff

v.

AMALGAMATED COUNCIL OF GREYHOUND DIVISIONS, *et al.*
Defendants.

MEMORANDUM AND ORDER

THOMAS, *J.*

After a bench trial, this court entered judgment in favor of defendant Greyhound (plaintiff's employer) and defendant Amalgamated (plaintiff's union) on March 6, 1978. Plaintiff Michael H. Mitchell has moved this court to reconsider its decision on the merits.

Article 56 "Supervisory Seniority" of the agreement between Greyhound Lines, Inc. and the Amalgamated Council of Greyhound Divisions (November 1, 1974 - October 31, 1977), under different article numbers, has been a part of the agreement since prior to the first employment of Frank Swipes on June 14, 1956. It provided:

> Employees under the terms of this Agreement accepting supervisory positions with the Company . . . who have less than two (2) years seniority at the time of accepting such positions shall retain, but not accumulate seniority while in such positions. . . .
>
> Employees with two (2) years or more seniority at the time of accepting supervisory positions with the Company shall retain and accumulate seniority ratings and benefits while in such positions.

This court determined that Swipes did not occupy a supervisory position when he served as a dispatcher trainee from June 1, 1958 until January 1, 1959, at which time he was promoted to dispatcher, admittedly a supervisory position. In doing so, this court applied and relied on the language of Article 1, "Recognition," by which clause the Union was recognized as the sole and exclusive bargaining collective bargaining representative for all employees "in the occupations as set forth in the wage provisions hereof . . . except for supervisory employees with the power to hire or fire or with the right effectively to recommend hiring or firing." It is undisputed that Swipes did not possess any of these powers as dispatcher trainee.

Of course if the position of dispatcher trainee which Swipes took on June 1, 1958 was a "supervisory position" then he would not have been permitted to accumulate and retain seniority after his promotion to dispatcher because his prior service as a driver (June 14, 1956 to June 1, 1958) was less than two years. Under the circumstances, Swipes would then have less seniority than the plaintiff Mitchell. Thus in determining whether the Union acted arbitrarily, capriciously and unreasonably in deciding that the dispatcher trainee position was not a supervisory position (a decision concurred in by the Company), this court

had to decide whether there was sufficient basis in fact for such decision of the Union and Company.

Plaintiff expands this argument into three steps. He states:

> "Supervisor" is defined at 29 U.S.C. §152(11)[1] [footnote as in original] (Subsection (11)). But the classification has been held to be more extensive than appears on the face of the statute. Subsection (11) is the primary vehicle by which individuals are excluded from coverage of the National Labor Relations Act ("Act"). Individuals so excluded are not permitted to be part of a collective bargaining unit which includes rank and file employees.
>
> 1.
>
> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Plaintiff errs.

In *Florida Power & Light v. Electrical Workers*, 417 U.S. 790 (1974), the Supreme Court noted that when Congress in 1947 amended the definition of "employee" in section 2(3) of the National Labor Relations Act, 29 U.S.C. §152(3), "to exclude those denominated supervisors under section 2(11), 29 U.S.C. §152(11), thereby excluding them from the coverage of the Act," *Id.* at 807, Congress also

enacted section 14(a), 29 U.S.C. §164(a) that "explicitly" provides:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

Continuing, the court stated:

> Thus, while supervisors are permitted to become union members, Congress sought to insure the employer of the loyalty of his supervisors by reserving in him the right to refuse to hire union members as supervisors, [citations omitted] . . . and the right to refuse to engage in collective bargaining with them [citation omitted] . . . .

Id. at 808.

> Congress' solution was essentially one of providing the employer with an option. On the one hand, he is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union, see *Beasley v. Food Fair of North Carolina, Inc.*, [416 U.S. 653 (1974)]. Alternatively, an employer who wishes to do so can permit his supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through the traditional procedural of collective bargaining.

Id. at 812-813.

Consequently, plaintiff errs in next stating, "[n]or can persons falling within the ambit of Subsection (11)

be covered by a collective bargaining agreement relating to rank and file workers," even though he is correct that "managerial employees" are "excluded from the Act's coverage." While "managerial employees" are impliedly excluded from coverage under the Act, see *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 283-84, it does not follow that "managerial employees" could not be covered by a collective bargaining agreement relating to rank and file workers if the employer chose to enter such agreement granting recognition to employees having some managerial duties. Hence, even if the record required a finding, as plaintiff contends, that "Swipes, as dispatcher trainee, was a managerial employee" it would not follow that Swipes was "excluded from . . . the Greyhound Collective Bargaining Agreement pursuant to Subsection (11) as a supervisor."

On this motion for reconsideration, plaintiff for the first time makes the claim that Frank A. Swipes is a managerial employee. In stating that "Swipes, as dispatcher trainee, was a managerial employee," plaintiff seeks to test Swipes' service by applying a broad description of "managerial employees" that appears in several Labor Board decisions reviewed in *N.L.R.B. v. Bell Aerospace Co., supra.* These Labor Board decisions speak of "the interest of these employees [as] more closely identified with those of management." *Id.* at 286. However, the court then declares:

> The Board's exclusion of "managerial employees" defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer," has also been approved by courts without exception. [Citations omitted.]

Id. at 288. It is this more explicit definition of managerial employees, thus approved by the court, that should and will be used in testing Swipes' service as a dispatcher trainee.

In addition to revealing no exercise of the power to hire or fire or to recommend hiring or firing, the deposition of Frank A. Swipes reveals the nature of his work as a dispatcher trainee. Asked what his training consisted of, he stated, "Answering the phone, getting familiar with the paperwork." He answered "Yes" to the question, "Would it be fair to say that your training consisted of learning all aspects of the dispatcher's job?" The following questions and answers fill in the rest of the details of Swipes' service while he was a dispatcher trainee:

Q: But, during the training period, you were observing the dispatcher on duty handling—

A: I was exposed to them, but I never had occasion to come right down to the wire and make a decision or do what he was doing.

Q: Isn't it also true that you also discussed these things with the dispatcher that was training you?

A: No.

Q: You just sat there for six months?

A: Just sat there. He would assign us some work, and you would do this work; different clerical tasks.

Q: In addition to observing the dispatcher doing his job?

A: You would do that when you had a chance to.

Answering the telephone, doing different clerical tasks, observing the dispatcher doing his job but never making

a dispatcher's decision, and never doing what he was doing, do not rise to the responsibilities of "managerial employees" who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." Hence it is concluded and determined that while he was in training for the job of dispatcher, which job was to be given to "the person that did the best work," Swipes was not a "managerial employee."

This conclusion supports the reasonableness of the action of the "Joint Contract Interpretation Committee" at its meeting of June 4, 5, 1975 at which it took up the seniority grievance of Mr. Michael Mitchell (the plaintiff) which involved "the correctness of the position of Opr. Frank Swipes on the master seniority roster." In part, the minutes state, "Trainee. Not part of supervisory status." For the foregoing reasons, in addition to those given in this court's oral opinion of March 1, 1978, it is concluded and determined that the plaintiff has failed to show that defendant union acted arbitrarily, capriciously and without a reasonable basis in fact in taking the position during the processing of Mr. Mitchell's seniority grievance that as a dispatcher trainee during the period June 1, 1958 through January 1, 1959, Frank A. Swipes was not in a "supervisory position." Accordingly, defendants' motion for reconsideration is denied.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
United States District Judge

APPENDIX C

Decision of the United States Court of Appeals for the Sixth Circuit

(Filed August 13, 1980)

No. 78-3452

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL H. MITCHELL,
Plaintiff-Appellant,

v.

AMALGAMATED COUNCIL OF GREYHOUND DIVISIONS; AMALGAMATED TRANSIT UNION; GREYHOUND LINES, INC., AND FRANK A. SWIPES,
Defendants-Appellees.

ORDER

Before: CELEBREZZE & BROWN, *Circuit Judges,* and SILER, *District Judge.**

Appellant Mitchell and the defendant Swipes are employees of the defendant, Greyhound Lines, Inc., and members of the defendant Union. Mitchell brought this action against his Union and his employer alleging that the Union failed to fairly represent him with regard to his grievance against his employer, Greyhound.

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*Honorable Eugene Edward Siler, Jr., District Judge, United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

The collective bargaining agreement that governed the parties to this suit provided that employees with two or more years of seniority who change to supervisory positions shall retain and accumulate seniority while in such position.

Swipes began his employment as a bus driver on June 14, 1956. On June 1, 1958 Swipes became a dispatcher trainee. On January 16, 1959 he was promoted to dispatcher—a supervisory position. Swipes remained a dispatcher until 1972 when he returned to bus driving. Mitchell started as a bus driver in May, 1961 and has occupied that position at all relevant times. During the period between 1959 and 1972, Swipes was carried on the seniority rosters with a seniority date of June 14, 1956. Mitchell's seniority date was May, 1961.

The dispute in this case arose because Swipes had more seniority than Mitchell. According to Mitchell, Swipes could not accumulate driver seniority while he was a dispatcher trainee and dispatcher because the dispatcher trainee position was managerial or supervisory, and thus Swipes was 13 days short of having the requisite two years of seniority when he accepted that position.

Mitchell filed a grievance alleging that Swipes had been granted seniority in violation of the collective bargaining agreement. The Contract Interpretation Committee (CIC), manned equally by the Union and the Company, ruled against Mitchell. The CIC held that the position of dispatcher trainee was not supervisory, and therefore Swipes was entitled to seniority. After that decision, the Union elected not to carry the grievance to arbitration because it believed that Mitchell's claim was without merit.

Mitchell then commenced this action in federal court. The District Court heard the case without a jury and ruled

for the defendants. Judge Thomas held that Mitchell had not proved his case of unfair representation, and that the Union had not acted arbitrarily or perfunctorily. This appeal followed.

Appellant now urges that the district court erred in concluding that the union did not violate its duty of fair representation.

The Supreme Court ruled on the standard for deciding fair representation cases in *Vaca v. Sipes,* 386 U.S. 171 (1967). There, the Court stated that a union does not violate its duty of fair representation when it makes decisions as to the merits of a grievance in a good faith and non-arbitrary manner. The Court noted that an individual employee does not have an absolute right to have a grievance taken to arbitration.

In *Hines v. Anchor Motor Freight,* 424 U.S. 554 (1976), the Court reiterated this standard, holding that a union violates its duty of fair representation only if it arbitrarily ignores a meritorious grievance or processes it in a perfunctory fashion.

Consistent with these decisions, this court has held that a plaintiff must establish by a preponderance of the evidence arbitrary or bad faith conduct in duty of fair representation cases that the union decides are without merit. *Ruzicka v. General Motors Corp.,* 523 F.2d 306 (6th Cir. 1975); *Dill v. Greyhound Corp.,* 435 F.2d 231 (6th Cir. 1970).

After a review of the record we can only agree with Judge Thomas' conclusion that appellant failed to establish a breach of the duty of fair representation by a preponderance of the evidence.

Accordingly, the judgment of the District Court is AFFIRMED.

Entered by Order of the Court

/s/ JOHN P. HEHMAN, *Clerk*
/s/ SARA L. ALTMAN
Deputy Clerk

ISSUED AS MANDATE: September 12, 1980

COSTS: None